INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	8
Conclusion	17
Appendix	18

CITATIONS

CASES:

Aluminum Company of America v. *Federal Power Commission*, 130 F. 2d 445 8

American Federation of Labor v. *Labor Board*, 308 U. S. 401 ...8, 13

American Power & Light Company v. *Securities & Exchange Commission*, 325 U. S. 385 8

American Sumatra Tobacco Corp. v. *Securities & Exchange Commission*, 93 F. 2d 236 14

American T. & T. Co. v. *United States*, 299 U. S. 232 14

Assigned Car Cases, 274 U. S. 564 16

Bi-Metallic Investment Co. v. *State Board of Equalization*, 239 U. S. 441 13

Bowles v. *Willingham*, 321 U. S. 503 13

Canadian River Gas Co. v. *Federal Power Commission*, 110 F. 2d 350, certiorari denied, 311 U. S. 693 8

Carolina Aluminum Co. v. *Federal Power Commission*, 97 F. 2d 435 .....8, 11

Columbia Broadcasting System, Inc. v. *United States*, 316 U. S. 407 .....15, 16

East Ohio Gas Co. v. *Federal Power Commission*, 115 F. 2d 385 .. 8

Eccles v. *Peoples Bank*, 333 U. S. 426 14

Federal Communications Commission v. *WJR*, 337 U. S. 265 12

Federal Power Commission v. *East Ohio Gas Co.*, 338 U. S. 464 .. 15

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 8

Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375 .....8, 9, 15

Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156 .....8, 11, 16

Mississippi Power & Light Co. v. *Federal Power Commission*, 131 F. 2d 148 8

Northwestern Electric Co. v. *Federal Power Commission*, 321 U. S. 119 .....12, 15

Oklahoma v. *United States Civil Service Commission*, 330 U. S. 127 8

Page

Philadelphia Co. v. *Securities & Exchange Commission*, 164 F. 2d 889, certiorari denied, 333 U. S. 828 14
Philadelphia Co. v. *Securities & Exchange Commission*, 175 F. 2d 808, certiorari granted and reversed as moot, 337 U. S. 901 ... 14
United States v. *B. & O. R. Co.*, 293 U. S. 454 16

STATUTES:

Act of June 25, 1948 (62 Stat. 869) 15
Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, as amended):
Sec. 4 18
Sec. 7 20
Sec. 8 22
Sec. 10 24
Communications Act of 1934, Sec. 402(a), (48 Stat. 1093, 47 U.S.C. 402(a)) 15
Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, 21 U.S.C. 301) 12
Federal Power Act:
Sec. 313(b) 9
Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*):
Sec. 3 10
Sec. 4 ..... 8, 11
Sec. 4(a) 12
Sec. 4(b) 12
Sec. 4(c) 5
Sec. 4(d) 10
Sec. 4(e) 10
Sec. 5(a) 10, 12
Sec. 7 12
Sec. 7(a) 10
Sec. 7(c) 10
Sec. 7(f) 10
Sec. 8 12
Sec. 8(a) 10, 11
Sec. 8(b) 12
Sec. 9(a) 10
Sec. 10(a) 12
Sec. 14(b) 10
Sec. 14(e) 10
Sec. 15(a) 10
Sec. 15(b) 10
Sec. 16 5
Sec. 17(a) 10, 11
Sec. 19(a) 10

Page

Sec. 19(b) 8, 9, 10, 13, 16
Sec. 22 10
Urgent Deficiencies Act (38 Stat. 219, formerly 28 U.S.C. 47) ... 15
28 U.S.C. 1253 15
28 U.S.C. 2101 15
28 U.S.C. 2284 15
28 U.S.C. 2325 15

MISCELLANEOUS:

Attorney General's Manual on the Administrative Procedure Act (1947), pp. 32, 95 12
18 C.F.R. Part 154 3
18 C.F.R. Part 20 12
18 C.F.R. Subchapter B, 1938 Supp., Sec. 54.1 4
Federal Power Commission's General Rules and Regulations, as revised:
Sec. 154.52 14
Sec. 154.82 ..... 7, 14
Sec. 154.85 ..... 7, 14
13 Federal Register 2045-2050 6
13 Federal Register 3343-3344 6
13 Federal Register 3820 6
13 Federal Register 5214 6
13 Federal Register 5441 7
S. Doc. No. 10, 77th Cong., 1st sess., Administrative Procedure in Government Agencies, Part 12 (Federal Power Commission), p. 40 12

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 216

UNITED GAS PIPE LINE COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 349-354) is reported at 181 F. 2d 796.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1950 (R. 355). A petition for rehearing

was denied on May 31, 1950 (R. 368). The petition for a writ of certiorari was filed on July 24, 1950. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals lacks jurisdiction under Section 19(b) of the Natural Gas Act, directly to review Order No. 144 of the Federal Power Commission, promulgating amendments of that part of its General Rules and Regulations relating to the form and composition of rate schedules and tariffs.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938 (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U. S. C. 717 *et seq.*) appear in the pamphlet copy of the Act submitted with this brief. The pertinent provisions of the Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. 1001 *et seq.* as amended) are set out in the Appendix, *infra,* pp. 18-26.

STATEMENT

On February 8, 1949, United Gas Pipe Line Company (United), a natural-gas company subject to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act, filed a petition in the Court of Appeals for the District of Columbia Circuit, seeking review of Commission's Order No. 144 issued on October 30, 1948

(R. 287-318). By this Order, the Commission undertook to amend that part of its General Rules and Regulations governing the form, composition, filing and posting of rate schedules and tariffs for the transportation or sale of natural gas subject to the Commission's jurisdiction (18 C.F.R. Part 154) (R. 227-256). In its petition, United alleged that by this amendment the Commission has undertaken to abrogate or change its contracts, without a hearing, thereby confiscating its property and denying it due process of law, in violation of the Fifth Amendment (R. 314). The court of appeals dismissed the petition on the ground that it was without jurisdiction under the Natural Gas Act and the Administrative Procedure Act to review regulations of general applicability (R. 349-354). The facts, which are undisputed, may be briefly summarized:

When the Natural Gas Act was approved on June 21, 1938, natural-gas companies had no rate schedules generally applicable to stated classifications of service, prevailing practice being to sell natural gas under individual contracts frequently arrived at after extensive negotiations and greatly varying in form and content (R. 227). Nevertheless, to expedite the establishment of legal rates, the Commission permitted natural-gas companies to file their contracts as rate schedules in compliance with Section 4 of the Act, when without hearing or other proceeding it issued its "Provisional Rules of Practice and Regulations under

the Natural Gas Act," effective July 11, 1938 (R. 227-228).[1] Subsequently, unlimited supplementation of filed contracts by additional agreements and the filing of new contracts multiplied the complexity of already complicated rate schedules (R. 99, 228).

Appreciating the difficulties inherent in that system and in order to assure uniformity and simplification of rate schedules, the Commission in August 1940 distributed a draft of "Tentative Instructions for Preparing and Filing FPC Gas Schedules" to all natural-gas companies, inviting their comments and suggestions (R. 2, 99, 228). Before the instructions could be worked into final form, however, the manpower shortage caused by the defense mobilization program compelled postponement of this work (R. 99, 228).

Although action on the regulations was held in abeyance until 1948, a substantial number of natural-gas companies, voluntarily and in cooperation with the Commission's staff, revised their complicated rate schedules by filing tariffs similar to

---

[1] 18 CFR Subchapter B, 1938 Supp., Section 54.1 of the provisional regulations defined "rate schedule" to "include and mean any contract, agreement, lease of facilities or other writing, including supplements thereto, which specifies or affects the rates and charges to be assessed or collected for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or which establishes any rule, regulation, classification, or practice affecting such rates and charges or the service rendered or to be rendered."

those now provided for in the present regulations (R. 3, 228). Prior to issuance of Order No. 144, sales of natural gas under such voluntarily filed tariffs represented about 50% of the volume of sales by all natural-gas companies reporting to the Commission and accounted for more than 50% of total revenue derived from sales subject to the jurisdiction of the Commission (R. 228). Before converting their sales contracts to tariff form, these companies had on file with the Commission 398 separate schedules consisting of about 7,000 pages; the substituted tariffs comprised only 388 pages (R. 228).

Recognizing the benefits from these changes to consumers and to the industry as well (R. 3, 229), the Commission acting under Sections 4(c) and 16 of the Natural Gas Act [2] again in April 1948 pro-

---

[2] Section 4(c) provides:

> Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Section 16 provides in part:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind

posed amendments of its regulations relating to rate schedules, mailing a copy to each natural-gas company with an invitation to submit comments and suggestions by May 14, 1948, and publishing the proposals in the Federal Register on April 16, 1948 (R. 229, 1-25, 26; 13 F. R. 2045-2050). After twice extending, upon request, the time for filing comments (R. 35, 38-39), the Commission, on June 15, 1948, in response to the several requests, directed that a public hearing be held at a time and place to be designated subsequently, although stating that such rules as were proposed were "not required by the Natural Gas Act to be made on the record after opportunity for hearing" (R. 40-42; 13 F. R. 3343-3344). On July 2, 1948, the Commission fixed the date of hearing for September 20, 1948 (R. 43-44; 13 F. R. 3820). Many industry suggestions respecting the initial proposals were constructive, and were incorporated in a revision which likewise was mailed to each natural-gas company and published in the Federal Register on September 8, 1948 (R. 229, 63-87; 13 F. R. 5214).

A number of parties, including petitioner, requested the Commission to postpone the presentation of evidence and to limit the September 20, 1948, hearing to oral argument with respect to the lawfulness of certain aspects of the proposals (R. 91-93). The Commission, on September 13, 1948,

---

such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. * * *

ordered that, in lieu of the presentation of evidence theretofore set for September 20, 1948, oral argument be heard on that date on "all issues involved" in the matter, and that such argument would "conclude the proceedings incident to this rule-making unless otherwise determined by the Commission at the conclusion of such oral argument" (R. 94-95; 13 F. R. 5441). Oral argument was heard by the Commission on September 20, 1948 (R. 96-226).

On October 28, 1948, the Commission issued its Order No. 144 (R. 227-254). The principal attacks on the proposed revisions were centered on those relating to restatement in dollars and cents of contract rates providing for "sharing" or "percentage" arrangements, and those thought to affect automatic "adjustment" clauses of contracts then on file. It was contended that these provisions would affect substantive rights of the natural-gas companies which it was claimed could not be modified in a general rule-making proceeding. To meet these attacks "to the extent that they have substance," the Commission in Order No. 144 made additional modifications in the regulations as issued (R. 229-230). As revised, the regulations (Section 154.82) permit natural-gas companies to retain in effect, without change, price provisions of presently effective rate schedules which cannot be restated in dollars and cents without effecting a change in rates or charges. In addition, Section 154.85 was reworded so as to clarify the Commission's intention to permit contracts now on file as effective rate

schedules to continue in effect as executed service agreements until they expire or are superseded. Thirteen companies, including petitioner (R. 257-264), applied for rehearing which the Commission denied on December 21, 1948 (R. 274-276).

ARGUMENT

The court below was, we submit, clearly correct in the holding that Section 19(b) of the Natural Gas Act does not vest jurisdiction in it directly to review the Commission's amendment of its general rules and regulations here involved.

1. In enacting Section 19(b), Congress has not made every Commission action reviewable in the court of appeals [3] but rather has prescribed, as it has the undoubted power to do,[4] certain conditions

---

[3] *F. P. C.* v. *Metropolitan Edison Co.*, 304 U. S. 375 (order directing filing of information and production of records); *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618-619 (findings as to lawfulness of past rates); *Carolina Aluminum Co.* v. *F. P. C.*, 97 F. 2d 435 (C. A. 4) (findings that interstate commerce would be affected by construction of proposed hydro-electric project); *Canadian River Gas Co.* v. *F. P. C.*, 110 F. 2d 350 (C. A. 10), certiorari denied, 311 U. S. 693 (order instituting investigations); *East Ohio Gas Co.* v. *F. P. C.*, 115 F. 2d 385 (C. A. 6) (order instituting investigation); *Aluminum Company of America* v. *F. P. C.*, 130 F. 2d 445 (C.A.D.C.) (order denying request for trial examiner's report); *Mississippi Power & Light Co.* v. *F. P. C.*, 131 F. 2d 148 (C. A. 5) (order instituting investigation).

[4] *American Federation of Labor* v. *Labor Board*, 308 U. S. 401, 404; *American Power & Light Company* v. *SEC*, 325 U. S. 385, 389; *F. P. C.* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127, 137.

which must be met before the courts of appeals may review Commission action taken under the Act. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, points out that Section 313(b) of the Federal Power Act indicates, as do the identical provisions of Section 19(b),

> the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

Indeed it would be difficult for a court of appeals to review an administrative order which was not, and was not required to be, based upon evidence adduced before the administrative body.

There are additional factors, unmentioned in the *Metropolitan Edison* case, which strongly reinforce the Court's conclusion there. For example, there is a close interrelationship between Section 19(b)

and the numerous provisions of the Act making a hearing, or opportunity therefor, a condition precedent to certain Commission action.[5] Thus, the "proceeding" which under Section 19(b) precedes a reviewable "order" refers to the "proceedings" described in the various provisions relating to the procedure at hearings. See, *e.g.*, Section 14(e), 15(a), 15(b), 17(a), and 22. Moreover, Section 19(b) permits review only at the instance of a "party to a proceeding" who is "aggrieved" by the Commission's "order"; mere aggrievement of interested persons is insufficient to support review and, of course, it is settled that not every Commission action or order constitutes a reviewable "order." See, *supra*, p. 8, fn. 3. Finally, no objection to an "order" may be considered on review unless it shall have been urged before the Commission in an "application for rehearing," and, indeed, Section 19(a) prohibits judicial review unless application shall first have been made to the Commission for "rehearing" on the "order." Clearly, therefore,

---

[5] Section 3 (issuance of export or import orders); Section 4(d), (e) (lawfulness of new rates filed by natural-gas company); Section 5(a) (determination of just and reasonable rates); Section 7(a) (extension or improvement of transportation facilities); Section 7(c) (application for certificates of public convenience and necessity); Section 7(f) (determination of service areas); Section 8(a) (determination of accounts into which particular outlays or receipts may be entered); Section 9(a) (requirement of proper and adequate depreciation and amortization accounts); Section 14(b) (adequacy of gas reserves).

a Commission order, which is reviewable under Section 19(b) is one which is adjudicatory in nature, entered after a hearing or opportunity therefor, and based on a record; *i.e.*, an order which "is analogous to the judgment of a court"—not the legislative function of rule making. *Carolina Aluminum Co.* v. *F. P. C.*, 97 F. 2d 435, 436 (C. A. 4).

2. Order No. 144 does not meet Section 19(b)'s "distinctive formulation of the conditions under which resort to the courts may be made." Cf. *F. P. C.* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159. In issuing these regulations, the Commission proceeded in announced reliance on Sections 4 and 16 of the Act and promulgated regulations purporting to be of general applicability, as authorized by these Sections. These provisions do not require the holding of a hearing prior to the promulgation of the regulations and no "hearing" was in fact held; no "proceeding" of any sort was prerequisite under the Natural Gas Act.[6] Nor did the Adminis-

---

[6] These sections are comparable to other provisions of the Act vesting power in the Commission to issue legislative rules of general applicability as well as orders of an investigatory or procedural character, in that similarly no hearing is required as a condition precedent to Commission action. For example, Section 8(a) requires that every natural-gas company keep such accounts and records "as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this act." That authorization, the foundation of the Commission's prescription of its "Uniform System of Accounts for Natural-Gas Companies"

trative Procedure Act require a "proceeding" of the sort plainly contemplated by Section 19(b); that Act requires only that the Commission give appropriate notice to the persons subject to the proposed rule (Section 4(a)) and afford interested persons an opportunity to submit "written data, views, or arguments with or without opportunity to present the same orally in any manner" (Section 4(b)).[7] Even the opportunity for submission or oral arguments afforded by the Commission was discretionary. Cf. *Federal Communications Commission* v. *WJR,* 337 U. S. 265. In short, mere

---

(18 CFR Part 20), is not conditioned upon a prior hearing. See Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st sess., Part 12 (Federal Power Commission), p. 40; cf. *Northwestern Electric Co.* v. *F. P. C.,* 321 U. S. 119, 122-123. See, also, Sections 8(b), 5(a), and 10(a).

[7] While Section 4(b) of the Administrative Procedure Act also requires that "where rules are required by statute to be made on the record after opportunity for an agency hearing" Section 7, concerning "hearings," and Section 8 concerning "decisions" shall apply in the place of Section 4(b), we have already shown (*supra,* p. 11) that the Natural Gas Act did not require the Commission to issue these regulations "on the record after opportunity for agency hearing." Accordingly, Section 4(b), not Sections 7 and 8 of the Administrative Procedure Act, is applicable. See Attorney General's Manual on The Administrative Procedure Act (1947), p. 32, pointing out that "statutes rarely require hearings prior to the issuance of rules of general applicability," the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, 21 U. S. C. 301) being "almost unique" in requiring hearing and decision on the record in the case of substantive rules of general applicability.

issuance would have satisfied the requirements of the Natural Gas Act, and prior notice with right to comment in writing would have satisfied the requirements of the Administrative Procedure Act.[8] Hence, there was no "evidence," no "transcript of the record,"[9] and no "findings" of the sort contemplated; none was required.

Moreover, consistently with the Commission's compliance with rule-making procedures, the regulations on their face indicate that they are of general applicability. They undertake to apply generally to all natural-gas companies, and although the Commission label is not controlling (*American Federation of Labor* v. *Labor Board,* 308 U. S. 401, 408), it seems clear from the number of natural-gas companies which participated before the Commission (R. 63, 96-98, 100-102, 229) and sought rehearing (R. 276) that as a practical matter the regulations were understood by the industry to apply generally to natural-gas companies. Indeed, since December 1, 1948, their effective date, the new regulations have in fact been applied to all natural-gas companies having rate schedules on file except petitioner, in whose case the court below,

---

[8] In promulgating general rules, as in legislation, there is no constitutional right to a hearing. *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U. S. 441; *Bowles* v. *Willingham,* 321 U. S. 503, 519-520.

[9] The materials relevant to promulgation of the regulations which the Commission certified to and filed with the court below plainly does not constitute a "transcript of the record" within the contemplation of Section 19(b).

with the Commission's consent, has stayed those parts of the regulations of which petitioner complained (R. 340-341). In addition, the regulations did not affect any then existing contracts including those of petitioners. There are express provisions to that effect in the regulations (See Sections 154.52, 154.82, 154.85 (R. 243, 249, 251, cf. R. 230)) and the Commission has given assurances that it interprets the regulations as operating only prospectively (R. 353).[10] Cf. *American T. & T. Co.* v. *United States*, 299 U. S. 232, 241; *Eccles* v. *Peoples Bank*, 333 U. S. 426, 435. In these circumstances, it seems plain that the regulations involved rule making and were not adjudicatory as petitioner contends (Pet. passim),[11] and hence that no

---

[10] The motion for stay of the regulations filed by Michigan Consolidated Gas Company, which had also sought review, was denied upon the agreement of counsel to a suggestion of the presiding judge that there be incorporated in the order denying the stay the statement of Commission counsel that:

> The Commission interprets Order No. 144 as not authorizing the making of any change in an effective rate, charge, or contract provision, without compliance with the Natural Gas Act, as amended.

[11] *American Sumatra Tobacco Corp.* v. *SEC*, 93 F. 2d 236 (C. A. D. C.); *Philadelphia Co.* v. *SEC*, 164 F. 2d 889 (C. A. D. C.), certiorari denied, 333 U. S. 828, and *Philadelphia Co.* v. *SEC*, 175 F. 2d 808 (C. A. D. C.), certiorari granted and reversed as moot, 337 U. S. 901, relied on by petitioner (Pet. 8-11), involved orders which the court of appeals had held to be adjudicatory on the facts as admitted in the pleadings. Accordingly, the holdings in these cases, that a hearing was a prerequisite to agency action or that such action resulted in a reviewable "order," are inapposite here.

hearing was required prior to their issuance and that they are not reviewable at this time under Section 19(b) of the Act.[12]

3. Cases such as *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407, holding that general regulations which injure the complainant irreparably are reviewable as "orders" under the provisions of Section 402(a) of the Communications Act of 1934 (48 Stat. 1093, 47 U. S. C. 402(a) and the Urgent Deficiencies Act (38 Stat. 219, formerly 28 U. S. C. 47)[13] are clearly distinguishable, because of differences in the underlying statute and because the court is a district court of original jurisdiction. Review under these statutes covers all "orders" of the administrative agency (except for certain specified exceptions under Sec-

---

[12] We do not suggest that the regulations are completely beyond judicial scrutiny, but rather that they are not directly reviewable under Section 19(b). We believe the Natural Gas Act permits other ways for testing the regulations' validity. For example, if petitioner should not properly comply with the regulations, the Commission could set the matter for hearing, ordering it to show cause why it should not be directed to comply. Such a proceeding could result in an "order" reviewable under Section 19(b). Cf. *Northwestern Electric Co.* v. *F. P. C.,* 321 U. S. 119; *F. P. C.* v. *East Ohio Gas Co.,* 338 U. S. 464. Or, if petitioner refused to comply, it would have "full opportunity" to contest the validity of the regulations when the Commission applied for enforcement to the proper United States District Court. *F. P. C.* v. *Metropolitan Edison Co.,* 304 U. S. 375, 386-387.

[13] The revision of 28 U. S. C. by the Act of June 25, 1948 (62 Stat. 869), distributed the provisions of Section 47 among several sections. See, 28 U. S. C. 1253, 2101, 2284, 2325.

tion 402(a)), and the criteria for determining reviewability is whether the administrative action affects or determines rights generally, even though not directed to any particular person or corporation. *Columbia Broadcasting System, Inc.* v. *United States, supra,* at 417; see, also *Assigned Car Cases,* 274 U. S. 564; *United States* v. *B. & O. R. Co.,* 293 U. S. 454.

Review under Section 19(b) is, as we have shown, *supra,* pp. 8-11, totally different and far more circumscribed. Under the Urgent Deficiencies Act, for example, the right to review is established upon a statement of a cause of action in equity whereas an allegation of threatened injury under the Natural Gas Act is pertinent only with respect to the determination of aggrievement under Section 19(b)—one of a number of conditions which that section imposes as a prerequisite for review. With respect to the identical provisions of the Federal Power Act, this Court has already pointedly recognized the distinction in *F. P. C.* v. *Pacific Power & Light Co.,* 307 U. S. 156, 159:

> If the Federal Power Act had formally taken over the statutory provisions of the Urgent Deficiencies Act pertaining to review of orders of The Interstate Commerce Commission, the decision in *Rochester Telephone Corp.* v. *United States,* [307 U. S. 125,] would dispose of this case and sustain the assumption of jurisdiction below. But the Power Act contains a distinctive formulation of the

conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower federal courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

BRADFORD ROSS,
General Counsel.

WILLIAM S. TARVER,
Assistant General Counsel.

BERNARD A. FOSTER, JR.,
Attorney,
Federal Power Commission.

AUGUST 1950.

APPENDIX

The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, provides in pertinent part as follows:

* * * * * * * *

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(*a*) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure

thereon are impracticable, unnecessary, or contrary to the public interest.

(*b*) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(*c*) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(*d*) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * * * * * * *

HEARINGS

SEC. 7. In hearings which section 4 or 5 require to be conducted pursuant to this section—

(*a*) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(*b*) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the

settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(*c*) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(*d*) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive re-

cord for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(*a*) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such offi-

cers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(*b*) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * * * *

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(*a*) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(*b*) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review as provided by law.

(*c*) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly

required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(*d*) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(*e*) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1)

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * * * * *

☆ U.S. GOVERNMENT PRINTING OFFICE 1950—902611/P.C. 99

FILED
SEP 8 1950
CHARLES ELMORE CROP
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 216

UNITED GAS PIPE LINE COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER

C. HUFFMAN LEWIS
1525 Slattery Building
Shreveport, Louisiana

W. SCOTT WILKINSON
1525 Slattery Building
Shreveport, Louisiana

GEO. D. FISER
United Gas Building
Shreveport, Louisiana

Counsel for Petitioner
United Gas Pipe Line Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.